

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

MATTHEW C.

Claimant,

vs.

VALLEY MOUNTAIN REGIONAL  
CENTER,

Service Agency.

OAH No. N 2006040466

**DECISION**

Administrative Law Judge Deidre L. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Andreas, California on November 27, 2006.

Matthew C. (claimant) was represented by his mother (Mother) throughout the hearing. Claimant was present for part of the hearing.

Gary L. Westcott, Ph.D., clinical psychologist (Dr. Westcott), represented the service agency, Valley Mountain Regional Center (VMRC).

The record was held open for claimant to submit any reports or evaluations, and for VMRC to submit any response. On December 4, 2006, the following documents were timely submitted by claimant, marked for identification, and admitted into evidence:<sup>1</sup> (1) Exhibit A: cover letter dated November 30, 2006 from Teresa Viles-Reed, PhD., clinical psychologist, and attached documents regarding claimant from San Joaquin County Mental Health Services (SJC Mental Health), entitled Progress Notes dated May 4, 1999, and June 10, 1999, signed by Dr. Russell, SJC Mental Health Children and Youth Services Psychiatrist; (2) Exhibit B: cover letter from Mother and Letters of Conservatorship; (3) Exhibit C: evaluation dated November 1, 2006, from Roger C. Katz, PhD.; and (4) Exhibit D: evaluation dated November 13, 2006, from Gary L. Cavanaugh, M.D. The service agency's

---

<sup>1</sup> Welfare and Institutions Code section 4712, subdivision (i) provides that any relevant evidence shall be admitted, and that no party shall be required to formally authenticate any document.

response dated December 7, 2006, was marked for identification as Exhibit 39, and admitted. The matter was submitted on December 8, 2006.

## JURISDICTION AND PROCEDURE

On March 17, 2006, VMRC issued a Notice of Proposed Action (NPA) to claimant in which it proposed to deny and discontinue services to him, effective April 17, 2006, on the grounds that claimant had been found ineligible for regional center services pursuant to Welfare and Institutions Code section 4512, and California Code of Regulations, title 17, section 54000.<sup>2</sup> Because claimant is an existing recipient of VMRC services, he was notified that the services would continue during the appeal process if claimant's request for a fair hearing was timely filed.

Claimant appealed VMRC's action and timely filed a fair hearing request with VMRC on March 27, 2006. An informal hearing was held on April 24, 2006, which upheld the denial of eligibility. The matter was set for a state level fair hearing before the Office of Administrative Hearings (OAH), an independent adjudicative agency, on May 15, 2006. On May 11, 2006, OAH granted the service agency's unopposed request for a continuance, due to an emergency, and the hearing was reset for May 30, 2006. On May 24, 2006, OAH granted Mother's unopposed request for a continuance, so that an attorney could have time to review claimant's records, and the hearing was reset for August 8, 2006. On July 26, 2006, Mother moved for another continuance of the hearing until October, because she was recovering from a virus, Bell's palsy; the first attorney had declined to take the case, and Mother had just begun consulting with two different attorneys. On July 27, 2006, OAH granted the motion and continued the hearing to November 27, 2006.<sup>3</sup>

On November 27, 2006, Mother was not prepared to begin the hearing at 9:00 a.m., because she believed that an attorney with Protection & Advocacy, Jonathan Ellison, was supposed to appear to represent the family. Dr. Westcott telephoned Mr. Ellison. Mr. Ellison informed him that Mr. Ellison did not represent the family and would not appear. The hearing began at 10:00 a.m. Mother moved for a continuance to obtain legal representation, and VMRC objected. Mother conceded that Mr. Ellison told her that after he reviewed certain records, he would be in a position to make a determination whether to represent them. Mr. Ellison never informed Mother prior to the hearing that he had agreed to represent the family. In light of the previous continuances since May 2006, which afforded Mother time to retain counsel, claimant's motion for a further continuance was denied.

---

<sup>2</sup> The Lanterman Developmental Disabilities Services Act (Lanterman Act) authorizes specified services for individuals defined as "developmentally disabled."

<sup>3</sup> Mother signed a waiver of time and waived the right to have a fair hearing and decision within the statutory time limits of the Lanterman Act.

## ISSUES

1. Within the meaning of California Welfare and Institutions Code section 4512, subdivision (a), is claimant developmentally disabled due to mental retardation, as defined, which would permit him to continue to receive regional center services?
2. If not, is claimant developmentally disabled due to a condition closely related to mental retardation, or a condition which requires treatment similar to that required for individuals with mental retardation?
3. If so, is the condition substantially disabling for claimant?
4. Does claimant have a qualifying disabling condition that originated before the age of 18?

## FACTUAL FINDINGS

1. Dr. Westcott, claimant's mother, and claimant's therapist Teresa Viles-Reed, Ph.D., a clinical psychologist associated with SJC Mental Health Services, testified at the hearing.
2. Claimant was born in 1988, and is now 18 years old. Claimant has never been diagnosed with cerebral palsy, epilepsy, or autism, and does not claim to be eligible for regional center services due to those disabilities. Claimant contends that he should continue to receive services from VMRC because he is either mentally retarded, or qualifies under the fifth statutory category of eligibility on the ground that he has a condition closely related to mental retardation, or needs treatment similar to that required for individuals with mental retardation.<sup>4</sup> As the following history shows, after being found ineligible for regional center services several times, VMRC and claimant agreed in January 2000 that claimant was eligible under the fifth category of a condition similar to, or needing treatment similar to that required for individuals with mental retardation. VMRC contends that claimant's condition renders him presently ineligible for continued services.
3. Beginning in May 1994, VMRC evaluated claimant for regional service eligibility, after a referral from a neurologist at San Joaquin General Hospital.<sup>5</sup> Mother told VMRC that claimant, then six years old, had previously been diagnosed by the University of Pacific (UOP) Department of Behavioral Medicine with attention deficit hyperactivity disorder (ADHD), and mild mental retardation, and was prescribed Ritalin. The 1994 VMRC intake assessment included a Developmental Profile II standardized inventory of skills, and a review of pertinent records. It is unknown if any UOP records were among those reviewed. Claimant had behavior problems, daily bowel control problems, and had

---

<sup>4</sup> See Legal Conclusions 3 and 4.

<sup>5</sup> Mother's prior 1993 request for services for claimant was withdrawn.

been suspended from school for urinating in a sandbox and on a friend's face. The San Joaquin General Hospital neurologist had diagnosed claimant with cognitive and language delays. In July 1994, the interdisciplinary team at VMRC, including Dr. Westcott, was "uncertain" about claimant's diagnosis, and wanted to see an updated psychological evaluation.

4. In July 1994, Dr. Westcott requested an updated evaluation. On September 30, 1994, Robert L. Mattesich, a licensed educational psychologist, conducted an updated psychological assessment of claimant at the request of VMRC. The tests included the Wechsler Intelligence Scale for Children-III (WISC-III), the Vineland Adaptive Behavior Scales-Interview Edition, the Peabody Picture Vocabulary Test-Revised, the Bender-Visual-Motor Gestalt Test, the Visual-Aural Digit Span Test, and the Wide Range Achievement Test-Revised. Dr. Mattesich found that claimant achieved a full scale IQ score of 84 on the WISC-III, that placed claimant's cognitive functioning level at the "upper end of the borderline range" or at the beginning of the low average intellectual level. Dr. Mattesich noted "significant scatter" (i.e. spread between scores) among claimant's subtest scores. The Vineland score of 54 revealed significant delays in claimant's adaptive behavior skills development in all three domains tested. In October 1994, the VMRC team reviewed Dr. Mattesich's report, and concluded that claimant was not eligible for regional center services. VMRC determined that claimant exhibited moderate delays in all areas of his development. In denying eligibility, the team concluded that claimant's cognitive ability was assessed to be in the "low average to average" range, and that claimant's adaptive delays appeared to be linked to medical problems and learning disabilities.

5. In July 1997, claimant was referred for regional center services by a school nurse, and VMRC conducted an updated intake assessment. Claimant had been tested at school and found to be cognitively in the deficient range. The testing tool or scores are unknown. Mother informed VMRC that she did not believe her son was mentally retarded but cooperated. Claimant reportedly had continued problems with bowel control, behavior, and emotion. Claimant's parents had divorced, the father was homeless, and claimant was traumatically affected. Claimant was still on Ritalin, and was receiving mental health counseling. VMRC administered the WISC-III again, and this time, claimant's scores resulted in a verbal score of 64, a performance score of 77, and a full scale IQ of 68, in the mildly mentally retarded range. Subtest scores are unknown. In September 1997, a VMRC interdisciplinary team, that included Dr. Westcott, denied eligibility. The team noted that claimant had a "complex test history with considerable variance across tests and across subtests. His scores range from the mildly retarded range to the fully average range." The team concurred with Dr. Westcott that claimant's condition arose from physical and psychiatric difficulties. Claimant's test scores did not show global impairment to the extent of mental retardation, or a condition similar to, or which requires treatment similar to mental retardation.

6. In October 1999, at the age of 11, claimant was again referred to VMRC by a school nurse. Claimant had been receiving services from SJC Mental Health since about 1994, consisting primarily of therapy sessions with Dr. Viles-Reed twice a month, and

periodic psychiatric consultations with Dr. Russell. Claimant continued to have significant behavioral problems, and problems with bowel control. Since the onset of puberty, claimant also exhibited sexually inappropriate behavior. Claimant was educationally placed in a special day class in a local public school. VMRC reviewed claimant's past clinical findings, and several tests were administered, including the Vineland regarding adaptive behavior. The VMRC intake coordinator cited both the 1994 and 1997 WISC-III tests, and other tests, and noted the prior denials of eligibility. The team noted: "Prior testing depicted diminished cognitive abilities, but with considerable variation in scores." In December 1999, the VMRC interdisciplinary team concluded again that claimant was not eligible for regional center services. Dr. Westcott was not on this team. The team concurred that claimant's adaptive skills were negatively impacted by emotional factors, and that he was cognitively in the "upper end of the borderline range."

7. Claimant appealed the December 1999 denial of eligibility and requested a fair hearing. Claimant and VMRC settled the case and entered into an agreement that claimant was eligible to receive regional center services in January 2000, at or after an informal hearing. On January 28, 2000, a VMRC interdisciplinary team agreed in a written review that claimant was eligible for services, with a developmental disability described as disabling "conditions similar and/or needs similar to persons with mental retardation." Dr. Westcott was not on this team. The team concurred that claimant should be reassessed in two years both for progress monitoring, and for another eligibility review. The team agreed that "whether or not a diagnosis of 'mental retardation' is appropriate, Matthew is functioning like a mentally retarded person." The review team noted that this was a new determination of eligibility under the fifth category. Claimant thereafter received developmentally disabled services from VMRC without an eligibility review until the fall of 2005.

8. Dr. Westcott testified that in the fall of 2005, claimant was referred to VMRC by San Joaquin County Superior Court Judge Barbara Aysha Kronlund for an evaluation pursuant to Welfare and Institutions Code section 6504.5. Claimant was then housed in the San Joaquin County Juvenile Detention facility facing criminal charges. Due to claimant's status as a developmentally disabled person receiving regional center services, VMRC was required to make recommendations for claimant's least restrictive residential placement, considering factors including claimant's treatment needs and public safety. The court did not order VMRC to evaluate or address claimant's mental competency to stand trial.

9. Dr. Westcott reviewed pertinent records regarding claimant, and conducted a clinical review with claimant on November 30, 2005, lasting over four hours. Dr. Westcott's report is dated December 1, 2005. Dr. Westcott discovered that VMRC failed to review and re-determine claimant's eligibility in 2002 as planned.<sup>6</sup> In addition to conducting the statutory evaluation for the court, Dr. Westcott also convened an eligibility review team to

---

<sup>6</sup> Mother testified that she was unaware that VMRC had a plan to review and re-determine claimant's eligibility two years after the January 2000 settlement. Regardless, a periodic review of eligibility to reassess handicapping conditions is prudent. Indeed the law requires that individual program review shall occur no less often than once every three years. (Wel. & Inst. Code § 4646.5, subd. (b).)

re-evaluate claimant's eligibility. Dr. Westcott testified that claimant's eligibility was called into question by information in unspecified "discovery records" that suggested "a sophistication in written language uncharacteristic of developmentally disabled individuals," as well as by the VMRC records showing that a planned review should have been conducted in 2002. Dr. Westcott concluded that the 2000 VMRC eligibility team wanted about two years to evaluate more information on the issue whether claimant's impaired intellectual or social functioning originated solely because of a psychiatric disorder, a disqualifying exclusion from eligibility.

10. No VMRC assessments or evaluations of claimant were produced or introduced into evidence for the period from January 2000 to December 2005. Dr. Westcott testified that the regional center's review of claimant "fell through the cracks." During that time frame, VMRC provided services to claimant, and received triennial special education psycho-educational evaluations of claimant from the Manteca Unified School District for September 2002, and April 2005.<sup>7</sup> The April 2005 triennial evaluation summarized prior assessments, including an August 1999 WISC-III evaluation by an unknown evaluator, in which claimant tested as mildly mentally retarded, with a full scale IQ of 64, performance IQ of 65, and verbal IQ of 67. No subtest scores were provided. The April 2005 report stated that claimant's cognitive ability "has consistently fallen into the Borderline to Intellectually Deficient range. He has a history of both receptive and expressive language delays, emotional/behavioral concerns, and variable academic scores. Developmentally, [claimant's] profile has indicated delays in all measured areas, including communication, self help, social, academic, and motor skills." The school psychologist, Debbie Tinges, reported in 2005 that claimant continued to meet the qualifications for special education services under two criteria: (1) cognitively impaired, and (2) emotionally disturbed.<sup>8</sup>

11. Dr. Westcott is a clinical psychologist and the manager of psychologists at VMRC. Dr. Westcott obtained a Ph.D. from the University of Washington. He became licensed in California in 1986, and has been in California regional center services since then. Dr. Westcott's dissertation involved intelligence test design, and he has conducted over 1,000 Wechsler Adult Intelligence Scale tests. During the clinical interview on November 30, 2005, Dr. Westcott administered various tests to claimant, including the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III), the Wide Range Achievement Test-Third Edition (WRAT-III), the Eyesenk Personality Questionnaire, the Rorschach Ink Blot test, and the House Tree Person Projective Drawing Test (HTP).

12. Dr. Westcott testified that claimant's IQ scores on the WAIS-III test eliminate mental retardation as a suspected area of eligibility. Claimant's scores included a verbal IQ score of 80, a performance IQ of 72, and a full scale IQ of 74. The subtest scores showed significant scatter, ranging from average scores of 9 in vocabulary, picture completion, and

---

<sup>7</sup> VMRC also received reports from the SJC Office of Education SELPA on claimant's levels of functioning, and reports from SJC Mental Health regarding claimant's treatment through the years.

<sup>8</sup> The level of cognitive impairment to qualify for special education services as mentally retarded is a different standard than that under the Lanterman Act. (Calif. Code of Regs., tit. 5, §3030, subd. (h).) See Legal Conclusions 4, 5, and 6.

information, to low scores of 4 in various other categories including arithmetic and digit symbol. Dr. Westcott noted that claimant's pattern of knowledge and academic scores, and the complexity of claimant's verbal expressive abilities, are inconsistent with a diagnosis of mental retardation, and in many areas claimant is well within average levels.

13. Dr. Westcott concluded from claimant's personality tests that claimant is an emotionally troubled person, "likely the victim of past abuse and unstable relationships," who is highly anxious, with limited ability to function in coping situations, and little ability to exercise control over his emotional drives. Claimant tends to fixate and engage in fantasy to meet his social, personal esteem, and achievement needs. Dr. Westcott stated that he could not determine if claimant has an underlying learning disability given the severe impact of the emotional disturbances. Dr. Westcott testified that claimant did not have a condition similar to mental retardation, or which requires treatment similar to that required for individuals with mental retardation. Dr. Westcott found that claimant's "ability to cope with the demands of daily life is severely deficient at this time and all areas of living are severely compromised by the depth and severity of his problems in emotional areas." It is Dr. Westcott's opinion that the types of services and treatment that claimant needs to address his severe deficiencies would be best addressed in a residential nonpublic school for the severely emotionally disturbed. Dr. Westcott did not provide any more specific psychiatric diagnosis.

14. Roger C. Katz, Ph.D., a clinical psychologist, submitted a report dated November 4, 2005, to the San Joaquin County Probation Department regarding claimant. Dr. Katz conducted a psychological evaluation of claimant at their request, to address the question of claimant's competency to stand trial. Claimant's hygiene was poor and he presented as unkempt, extremely immature, but cooperative. Dr. Katz reviewed unspecified "background information," and interviewed Mother and claimant's public defender. Dr. Katz believed that claimant was categorized as "mentally retarded" by VMRC, which was an incorrect characterization. Dr. Katz found claimant's judgment to be poor, and that he demonstrated unrealistic plans, such becoming a Marine. Claimant told Dr. Katz that claimant understood he was emotionally unstable, depressed, and had problems controlling his anger. Dr. Katz administered the Wechsler Abbreviated Scale of Intelligence (WASI) to evaluate claimant's cognitive abilities on November 2 and 4, 2005, prior to Dr. Westcott's examination. Dr. Katz reported that claimant's results were "consistent with those of previous examiners."<sup>9</sup> Claimant's verbal IQ was 67 and his performance IQ was 58. No subtest scores were provided. Claimant was incarcerated and under "considerable stress" from internal emotional pressures, which may have affected the scores. Dr. Katz concluded that claimant is mildly mentally retarded, in the first percentile for those in claimant's age group. On November 1, 2006, Dr. Katz evaluated claimant again and issued another report to the Juvenile Probation Department. Dr. Katz administered the KBIT-2, an abbreviated and brief test of intelligence. Claimant's scores included a composite IQ of 63, verbal score of 78, and nonverbal score of 58. Even though Dr. Katz characterized the scores as "consistent" with his 2005 scores, the verbal score was 11 points higher than that in 2005,

---

<sup>9</sup> Since claimant's prior scores were variable and inconsistent, it is unknown what reports Dr. Katz reviewed.

and showed a 20 point discrepancy between the verbal and nonverbal scores. Dr. Katz continued to find claimant to be functioning in the “borderline to mildly mentally retarded” range.<sup>10</sup>

15. Gary L. Cavanaugh, M.D., a psychiatrist, submitted a report dated December 2, 2005 to the San Joaquin County Juvenile Court. Dr. Cavanaugh was also asked to evaluate claimant’s legal competence. Dr. Cavanaugh reviewed selected historical documents about claimant, as well as the November 2005 evaluation by Dr. Katz, as described in Finding 14 above. Dr. Cavanaugh evaluated claimant on November 27, 2005, at the juvenile hall. Dr. Cavanaugh did not conduct any cognitive tests. Dr. Cavanaugh’s relevant conclusions, for purposes of this proceeding, included a diagnosis of “mild mental retardation with behavioral disturbances” on Axis II, relying on Dr. Katz’ report. On Axis I, Dr. Cavanaugh diagnosed “depressive disorder, not otherwise specified (NOS), mild to moderate fluctuating depression/dysphoria.” And, on Axis III, encopresis (inappropriate fecal soiling). Dr. Cavanaugh found that “diagnostically, by interview, mental status screening, *and testing by Dr. Katz*, this 17-year-old is clearly functioning in the mildly retarded range.” [Emphasis added.] On November 13, 2006, Dr. Cavanaugh submitted another report to the Juvenile Court, following an interview with claimant on October 30, 2006. Dr. Cavanaugh reviewed additional documents including Dr. Westcott’s December 2005 and October 2006 VMRC reports to the court, and some reports from SJC Mental Health. Claimant was in his fourth month of living in a group care home. Dr. Cavanaugh administered some tests, but again did not use cognitive tests. Dr. Cavanaugh still agreed with Dr. Katz’ diagnosis that claimant is “at the top end” of mild mental retardation.

16. Dr. Westcott disagreed with the opinions and diagnoses of both Dr. Katz and Dr. Cavanaugh. Dr. Westcott did not address whether his administration of the comprehensive WAIS-III to claimant in November 2005, following Dr. Katz’ administration of the WASI test by less than a month, had any likely effect on claimant’s scores. The WASI and the KBIT-2 are abbreviated evaluation tools, and Dr. Katz’ qualifications and experience are unknown. Based on the WAIS-III and related evaluation results in Dr. Westcott’s December 2005 report, the VMRC interdisciplinary team, including Dr. Westcott, completed their eligibility review of claimant in March 2006, and concluded claimant is not eligible for services because his handicapping condition is “solely psychiatric in nature.”

17. Dr. Viles-Reed is employed by Valley Community Counseling Service as a clinical psychologist. Dr. Viles-Reed testified that claimant has been known to her to be mildly mentally retarded during the twelve years she has been his therapist assigned through SJC Mental Health Services. Dr. Viles-Reed has never administered any cognitive tests to claimant, and has relied on the diagnoses of Dr. Russell at Mental Health, and school evaluations and reports. Dr. Russell is Mental Health’s “medication psychiatrist,” and there is no direct evidence regarding what he may have relied on to arrive at his diagnoses of

---

<sup>10</sup> Since borderline intellectual functioning is not a disability under the Lanterman Act, per se, and mild mental retardation is, the blending of the two in one diagnosis is problematic. Dr. Katz’ additional opinions regarding claimant’s competency to stand trial are irrelevant to this proceeding and are not considered.

ADHD, impulse control disorder, and mild mental retardation.<sup>11</sup> It is unknown whether Dr. Russell conducted any diagnostic evaluation of claimant's cognitive functioning. It is Dr. Viles-Reed's opinion that claimant's cognitive delays prevent claimant from benefiting from insight-oriented therapy. Her approach has been focused on developing behavioral strategies for him to reduce his aggression and depression. Dr. Russell has prescribed medications that claimant is currently on, including Risperdal (for behavior), and Zoloft (for depression). Dr. Viles-Reed has assumed that claimant's cognitive delays have significantly impacted his ability to function in the world, and has not looked for any psychiatric causes of claimant's behavior other than impulse control disorder or ADHD. Her role is not to diagnose but provide therapy. Mother believes that claimant should qualify under the fifth category of eligibility if not as mildly retarded, and does not believe that claimant is emotionally disturbed.

18. Official notice is taken of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV). The DSM-IV, section 317, defines mild mental retardation as an IQ level from 50-55 to approximately 70. The general diagnostic criteria for mental retardation, DSM-IV, page 41, are the following:

- A. Significantly subaverage intellectual functioning: an IQ of approximately 70 or below on an individually administered IQ test....
- B. Concurrent deficits or impairments in present adaptive functioning (i.e., the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group) in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
- C. The onset is before age 18 years.

19. The DSM-IV, pg. 41-42, states:

Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean). It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior. Conversely, Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive

---

<sup>11</sup> Dr. Russell's notes of his initial visit with claimant on May 4, 1999 indicated that Mother informed him that claimant was mentally retarded.

functioning.... When there is significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full scale IQ, will more accurately reflect the person's learning abilities. When there is a marked discrepancy across verbal and performance scores, averaging to obtain a full scale score can be misleading.

Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in persons with Mental Retardation. Adaptive functioning refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation.

20. A person with an IQ between 71 and 84, is not defined in the DSM-IV as mentally retarded, and is considered have borderline intellectual functioning. The DSM-IV, section V62-89, page 740, provides:

Borderline Intellectual Functioning ... describes an IQ range that is higher than that for Mental Retardation (generally 71-84).... Thus, it is possible to diagnose Mental Retardation in individuals with IQ scores between 71 and 75 if they have significant deficits in adaptive behavior that meet the criteria for Mental Retardation. Differentiating Mild Mental Retardation from Borderline Intellectual Functioning requires careful consideration of all available information.

21. In 1994, VMRC relied on Dr. Mattesich's IQ score of 84 to find that claimant was cognitively in the high borderline to low average range of intelligence. In 1997 (score 68), and again in 1999 (score 64), claimant's IQ scores were below 70, and placed him within the DMS-IV definition of mild mental retardation. These scores are somewhat consistent with Dr. Katz' 2005 test results. Dr. Westcott's 2005 full scale IQ score of 74 is another variable score that is more consistent with Dr. Mattesich's results. Both Dr. Mattesich's and Dr. Westcott's scores were the results of comprehensive Wechsler testing tools, including a full range of subtests with significant scatter in those scores. No subtest score information for either of Dr. Katz' abbreviated evaluations is known. Dr. Westcott believes that claimant's IQ scores are misleading because claimant's verbal sophistication and reading test scores are in excess of what would be expected for an individual with mental retardation. The variable nature of the scores and the significant scatter in claimant's subtest scores support his opinion.

22. Dr. Westcott thinks that claimant's cognitive functioning deficits are the result of a psychiatric disorder, which is excluded from the statutory definition of a developmental disability. As found in Finding 21 above, claimant's cognitive defects have shown variable levels over the years, instead of a more stable level that would be compatible with mental retardation. This position is consistent with VMRC's denial of claimant's eligibility in 1994, 1997, and 1999. Dr. Westcott pointed to claimant's longstanding encopresis as an example. The problem of inappropriate bowel soiling is not seen in mildly mentally retarded persons except at a younger age with delayed toilet training issues. Here, claimant is now 18 years old, and no medical source of the problem has been found to date. Claimant's academic performance has also varied due to chronic attendance problems,<sup>12</sup> and he has been involved in many episodes of explosive behavior, anger control difficulties, and attentional problems. Dr. Westcott credibly testified that claimant's complex emotional and psychiatric problems have significantly impacted claimant's intellectual growth and adaptive functioning.

## LEGAL CONCLUSIONS

### *Applicable Statutes and Regulations*

1. Because this is a case in which the regional center seeks to rescind claimant's eligibility for services, VMRC has the burden of proof.

2. The Lanterman Act is an entitlement act, and people who are found eligible under it are entitled to services and supports. The purpose of the law is both to prevent or minimize institutionalization of developmentally disabled persons, and to enable them to lead more independent, productive lives. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384.)

3. The Lanterman Act's definition of a qualifying developmental disability is very narrowly drawn. Welfare and Institutions Code section 4512, subdivision (a), states:

(a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation,<sup>13</sup> but shall not include

---

<sup>12</sup> For the 2004-2005 school year, claimant missed 203 periods out of 148 attendance days, and missed similar school time in prior years. For some period of time, claimant was home schooled by his mother.

<sup>13</sup> This fifth category of disability in the definition has become known as "the fifth category."

other handicapping conditions that are solely physical in nature.

4. California Code of Regulations, title 17, section 54000, provides:

(a) "Developmental Disability" means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

- (1) Originate before age eighteen;
- (2) Be likely to continue indefinitely;
- (3) Constitute a substantial disability for the individual as defined in the article.<sup>14</sup>

(c) Developmental Disability shall not include handicapping conditions that are:

- (1) *Solely psychiatric disorders* where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.
- (2) *Solely learning disabilities*. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.
- (3) *Solely physical in nature*. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

5. It is noted that the above exclusion of conditions arising solely from psychiatric disorders distinguishes and narrows the Lanterman Act definition of mental

---

<sup>14</sup> Substantial disability means significant limitations in three or more statutory areas of major life activity, including learning, self-care, language, self-direction, capacity for independent living, and economic self-sufficiency. (Wel. & Inst. Code §4512, subd. (l).)

retardation from the medical definition as set forth in the DSM-IV, as described in Finding 18 above. The medical definition of mental retardation in DSM-IV, section 317-319, requires that the significantly subaverage intellectual functioning be accompanied by concurrent deficits in adaptive functioning in at least two of the listed areas. It contains no limitation addressing the causal factors for either the impaired intellectual functioning or the impaired social functioning.

6. Under Education Code section 56000 et seq., and the implementing regulations, qualification for special education and related services may be based on a category of mental retardation that is defined as “significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect a pupil’s educational performance.” (Cal. Code Reg., tit. 5, §3030, subd. (h).) This definition does not mandate an IQ level of 70 or below, as does the DSM-IV. Nor does it exclude an otherwise qualifying condition if the impaired intellectual or social functioning is caused solely by a psychiatric disorder, as does the Lanterman Act.

7. Regarding the fifth category of eligibility, the court in *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, held that the words “closely related to” and “similar to” in section 4512, subdivision (a)’s definition were sufficiently clear to avoid a constitutional vagueness challenge, when considered as a whole with the implementing regulations. The court stated that “the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS [Department of Developmental Services] and RC [regional center] professionals determination as to whether an individual is developmentally disabled.” The court acknowledged that making a decision about whether a condition falls within the fifth category is a “difficult, complex determination.”

### *Eligibility*

8. Dr. Westcott’s testimony is credible and is entitled to significant weight as the regional center’s managing clinical psychologist with a lengthy history of making eligibility determinations for VMRC. No qualifications for Dr. Katz or Dr. Cavanaugh were presented at the hearing, and neither of them testified. The primary focus of the evaluations by both Dr. Katz and Dr. Cavanaugh was claimant’s legal competency in the face of criminal charges, and not his eligibility under the Lanterman Act. Dr. Cavanaugh conducted no cognitive evaluation of claimant and relied on Dr. Katz’ evaluations. Dr. Katz’ evaluations were abbreviated exams and no subtest scores were reported. Moreover, Dr. Katz was entitled to rely on the definition of “mental retardation” in the DSM-IV, and was not called upon to evaluate the handicapping condition as defined, narrowed, and limited under the Lanterman Act for purposes of eligibility for regional center services. (Findings 9 through 22.)

9. VMRC established by a preponderance of the evidence that claimant is not mentally retarded, as defined for purposes of the Lanterman Act. As set forth in Findings 3 through 17, claimant’s historical IQ scores have not been stable, and have been variable.

While claimant has obtained IQ scores that place him at the high end of the mild mental retardation category with a score of either near or below 70, he has also obtained higher scores in the borderline functioning to low average range. As provided in the DSM-IV definition of mild mental retardation, where there is “significant scatter in the subtest scores, the profile of strengths and weaknesses, rather than the mathematically derived full scale IQ, will more accurately reflect the person’s learning abilities.” In addition to claimant’s full scale IQ score variations, the tests with known subtest scores over the years showed significant scatter in those subtest scores, thus weakening reliance on the full scale scores. Dr. Westcott’s reliable and thorough 2005 WAIS-III evaluation results place claimant’s IQ in the borderline intellectual functioning range. Borderline intellectual functioning is a separate level of cognitive functioning that is excluded from the definition of developmental disability unless it relates to the fifth category.

10. Claimant’s IQ scores, if they were otherwise reliable, would not rule out a determination that claimant has a disabling condition under the fifth category, that is closely related to mental retardation or a condition requiring treatment similar to that for mental retardation. Dr. Westcott’s 2005 full scale IQ score for claimant was 74. (Findings 12, 18-20.) While that is above the high end of the mild mental retardation level, when the margin of error is taken into consideration the score appears at least “closely related” to that for mental retardation. Claimant is clearly cognitively impaired, and has significant deficits in his daily adaptive functioning. Under the broader definition of “mental retardation” for purposes of qualifying for special education in the public schools, claimant’s cognitive deficits made him eligible for those services. Claimant’s disability originated when he was very young, can be expected to continue indefinitely, and constitutes a substantial handicap in at least the areas of learning, self-care, self-direction, and capacity for independent living.

11. However, even if claimant’s condition closely resembles mental retardation, both in terms of cognitive limitations and adaptive functioning deficits, section 54000 of the implementing regulations prohibits a finding of developmental disability under the Lanterman Act if the handicapping conditions are “solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder.” This limitation applies whether the handicapping condition is mental retardation, or the fifth category. In narrowing the scope of eligibility for a funded entitlement program for the developmentally disabled, the Legislature and the implementing regulations have eliminated a broader range of handicapping conditions from coverage. As set forth in Findings 12, 13, 16, 21, and 22, and Legal Conclusions 8 and 9 above, claimant’s impaired cognitive functioning, revealed as it is with variable scores over the years, does not reflect mental retardation, as defined in the Lanterman Act, since they are the result of the severe effects of claimant’s psychological and emotional problems.<sup>15</sup> Claimant’s otherwise cognitive and social functioning impairments are excluded from coverage.

---

<sup>15</sup> If claimant’s psychiatric problems were simply comorbid with mental retardation, the cognitive IQ scoring would reflect that in more stable and global scores in the mentally retarded range.

12. As determined in Legal Conclusions 8 through 11 above, VMRC has established that claimant is not eligible for regional center services. Claimant's conditional eligibility in 2000 arose as the settlement of a legal dispute, and afforded him about six years of regional services to provide him with the benefit of the doubt. The recent re-evaluations show that, while claimant may be mentally retarded for other purposes, his handicapping conditions do not qualify as a developmental disability based on either mental retardation or the fifth category.

#### ORDER

Claimant Matthew C.'s appeal to continue his eligibility for regional center services is DENIED. Valley Mountain Regional Center's decision to deny claimant's eligibility and discontinue regional center services is AFFIRMED.

#### NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

Dated: \_\_\_\_\_

---

DEIDRE L. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings